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In the
Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; and PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented, as to which the courts of appeals are in disarray, which the Fifth Circuit answered inconsistently with *Lopez* and *Morrison*, and which are of immense practical importance, are:

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, noneconomic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, noneconomic species whose takes, considered alone, do not substantially affect interstate commerce.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Under Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) was established over 30 years ago and is the largest and most experienced nonprofit legal foundation of its kind, litigating matters affecting the public interest at all levels of the federal and state courts. PLF is a staunch advocate of limited government and opposes the expansive reading of the commerce power dominant in the courts today.

The Foundation has a long history of amicus participation in this Court and was involved in the landmark Commerce Clause cases on which this case turns: *United States v. Lopez*, 514 U.S. 549 (1995) (*Lopez*), and *United States v. Morrison*, 529 U.S. 598 (2000) (*Morrison*). PLF has also appeared before this Court in a number of Endangered Species Act (ESA) cases, such as *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Bennett v. Spear*, 520 U.S. 154 (1997); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*. In addition, PLF attorneys brought a Petition for Writ of Certiorari in *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert denied*, raising the same constitutional questions this case presents. Among its objectives, PLF seeks to have constitutionally-derived limits imposed on federal regulation of wholly intrastate, noncommercial activity, such as the "taking" of local, cave-dwelling insects in this case.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION

Few cases have a greater claim on Supreme Court review than this case. The Fifth Circuit decided the "taking" of minute insects—that live their entire lives underground in a small corner of a single state and have no commercial use—substantially affects interstate commerce. This case is emblematic of the difficulty the lower courts are having in settling on a uniform method of analyzing Commerce Clause enactments, such as the ESA, under this Court's decisions in *Lopez* and *Morrison*.

Unless it was economic in nature, this Court has never upheld a Commerce Clause regulation of an intrastate activity based on that activity's substantial effects on interstate commerce. *See Morrison*, 529 U.S. at 611. But the Fifth Circuit did so in this case by aggregating the effects of "takes" of all threatened and endangered species. That approach to finding "substantial effects" on interstate commerce is at odds with this and other federal courts that have considered the validity of Commerce Clause regulation as applied to intrastate, noncommercial conduct. Review of this case would therefore assist the lower courts in analyzing such cases.

STATEMENT OF THE CASE

For twenty years, Petitioners have tried to develop their 216 acre site west of Austin, Texas. After the landowners spent millions of dollars installing water lines, pump stations, and other infrastructure that were dedicated to the City of Austin, along with a right-of-way adjoining the nearby highway, the City granted development approval in 1984. In 1988, however,

the United States Fish and Wildlife Service listed six species of insects as endangered under the ESA that dwell in subterranean structures on Petitioners' property. These small insects live their entire lives underground in caves and sinkholes. They have been rarely seen and have no commercial use.

After the listing, the Service effectively stopped all development, claiming the development would harm, or "take," the species. Petitioners hired a consultant to survey their property and recommend appropriate protections. As a result, Petitioners dedicated several caves and more than 10 acres of buffer zone to a nonprofit foundation that established a preserve to protect the species. Although this initially satisfied the Service's concerns, Fish and Wildlife has since refused to authorize continued development and has threatened Petitioners with criminal prosecution if they modify their property. For more than 15 years, the Service has refused to grant or deny Petitioners' applications for an "incidental take permit" which would allow them to continue their development. Ultimately, driven to the point of bankruptcy, Petitioners sued the Service to act on their permit applications. The trial court held that the applications were de facto denied and this suit followed, challenging federal jurisdiction over the "taking" of intrastate, noncommercial cave-dwelling insects.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition for Writ of Certiorari because (1) the circuit courts disagree on how to apply the "substantial effects" test under *Lopez* and *Morrison* and (2) the validity of the ESA as applied to intrastate, noncommercial species, like the cave insects in this case, is an immensely important federal question affecting the lives of every citizen.

1. The Petition Should Be Granted Because the Circuit Courts Are Confused About the Scope of the Commerce Power and the Application of *Lopez* and *Morrison*

This case is symptomatic of the confusion that reigns among the circuit courts over Congress' power to regulate intrastate, noncommercial activity under the Commerce Clause. Within a week, both the Fifth Circuit in this case and the D.C. Circuit in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, upheld the ESA as applied to noncommercial local species against a Commerce Clause challenge. "Both cases reach the same result, but the legal analysis used to get there could hardly be more different." Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947 (2004). To find "substantial effects" on interstate commerce in this case, the Fifth Circuit held that "taking" of all threatened and endangered species could be aggregated as part of one interdependent web. The D.C. Circuit also found the requisite commerce connection but on different grounds. That court held that "the true object of ESA regulation is not endangered species, but the commercial development that threatens them." *Id.* at 947.

Although these circuit courts both sought to protect the listed species, Arroyo toads in *Rancho Viejo* and subterranean insects in this case, it was as if they were reading two different laws. *Id.* "This curious divergence can only be understood in light of the unsettled state of Commerce Clause jurisprudence following [] *Lopez* and [] *Morrison*." *Id.* With respect to determining the limits of the commerce power, those cases provided the lower courts an uncertain analytical structure. *Id.* This uncertainty is attributable to "the failure of the *Lopez* and *Morrison* framework to meet the Supreme Court's stated aspiration to distinguish 'between what is truly national and what is truly local.'" *Id.* at 948.

Numerous analytical difficulties have surfaced in the circuit courts that have tried to reconcile the "take" provision of the ESA with this Court's view of the commerce power under *Lopez* and *Morrison*. *See* Lilly Santaniello *Commerce Clause Challenges to the Endangered Species Act's Regulation of Intrastate Species on Private Land*, 10 Hastings W.- NW. J. Envtl. L. & Pol'y 39, 40 (2003). One analytical issue giving the lower courts trouble is identification of the activity regulated. *Id.* For example, when the building of a hospital threatens to harm an endangered fly (*National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)), is the regulated activity the "taking" of the fly or the construction of the hospital? Santaniello, *supra*, at 40. A second analytical difficulty for the lower courts is determining what constitutes economic activity. *Id.* If a rancher shoots a wolf to protect his livestock (*Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)), is the economic motivation of the rancher enough to make the "taking" an economic activity for Commerce Clause purposes? Santaniello, *supra,* at 40. A third difficulty arises when the lower courts try to determine whether the "aggregation principle" applies to intrastate, noncommercial species, as in this case and *Rancho Viejo*. Further, how does aggregation of noneconomic activity relate to the "larger regulatory scheme" theory that featured so prominently in *Lopez* and *Morrison*? *Id.* Finally, what is the significance of this Court's statements that Commerce Clause enactments must not obliterate the distinction between what is national and what is local? *Id.*

So far, the majority of circuit judges that have considered the issue have upheld the ESA against Commerce Clause challenges. *Id.* at 62. But in each case the judges were split and differing rationales were offered to support the decision. Also, the dissents have been vehement. *Id.* Judge Luttig, writing for the dissent in *Gibbs*, and Judge Sentelle, writing for the dissent in *National Association of Home Builders*, argued strenuously that the section 9 "take" provision of the ESA cannot be upheld

under *Lopez* and *Morrison* as applied to intrastate, noncommercial species. *Id.* And, of course, the six judge dissent to the denial of rehearing in this case is remarkable for the force with which it rebutted the panel decision upholding the ESA as applied to noncommercial cave-dwelling insects found only in the State of Texas.

The divergence of views expressed in every circuit court that has addressed an as-applied challenge to the ESA cries out for review of this case. So does the existence of irreconcilable rationales adopted by these circuits to uphold the ESA, such as the contradictory reasoning on which the Fifth Circuit relied in this case and the D.C. Circuit relied in *Rancho Viejo*. *See Rancho Viejo v. Norton,* 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Sentelle, J., dissenting) (noting that *Rancho Viejo* was in direct conflict with the decision in this case).

But there are other conflicts that warrant review of this case. Many circuits that have considered the scope of the Commerce Clause as applied to other laws have taken a view of *Lopez* and *Morrison* that cannot be squared with the decision of the Fifth Circuit in this case to aggregate noncommercial activity.

For example, in *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the defendants were charged with violating the federal arson statute by burning their home. The prosecution asserted that the home was "used in interstate commerce" because it received natural gas from an out-of-state source. *Id.* at 525. But the Ninth Circuit rejected this argument, noting that

> where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government . . . [it] must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Id at 527. *See also United States v. Lynch*, 282 F.3d 1049, 1054 (9th Cir. 2002) (Robbery does have an economic component; however, that economic component must rise above the simple, though forced, economic transaction between two individuals. Otherwise, almost any violent property crime would be transformed into a federal offense, contrary to the teachings of *Morrison*.).

In another arson case, the Eleventh Circuit held that the aggregation principle was not applicable to "intrastate, *non-economic activity.*" *United States v. Ballinger,* 312 F.3d 1264, 1270 (11th Cir. 2002). Ballinger had pled guilty to burning five churches in Georgia. The district court found that the churches involved had all purchased various supplies from out-of-state merchants, and that the defendant had traveled in interstate commerce, purchasing goods and services *en route,* while committing the arsons. *Id.* at 1266-1267. The defendant was charged with violating the federal arson statute which prohibited arson which "'is in or affects interstate . . . commerce.'" *Id.* at 1268 (*quoting* 18 U.S.C. § 247(b)). But the Eleventh Circuit rejected the government's aggregation theory:

> Where such regulation [of intrastate, non-economic activity] is at issue, the Constitution requires that the activity, by *itself,* have economic consequences that *substantially affect* interstate commerce. No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction.

Id. at 1270 (citation omitted).

The proper inquiry, the court held, was whether the arsons themselves had a substantial effect on interstate commerce. Because the court found the evidence (including Ballinger's travel and the churches' supply purchases) insufficient to prove

a substantial effect on interstate commerce, it reversed the conviction.

The Third Circuit in *United States v. McGuire,* 178 F.3d 203, 210 (3d Cir. 1999), also rejected the conclusion that noncommercial activity could be aggregated to "support the exercise of federal jurisdiction after *Lopez*." *Id.* There, the defendant was charged with blowing up a car which was occasionally used by a catering business, and which contained a carton of orange juice which had been shipped interstate. Although the court declined explicitly to address whether the Commerce Clause requires that each case demonstrate a substantial effect on interstate commerce, *id.* at 211 n.7, it did note that "*Lopez* preclude[s] applying the 'aggregation test' so broadly that it sweeps within its reach every use of every property that has an effect on interstate commerce no matter how diluted." *Id.* at 211. The *McGuire* court therefore reversed the conviction, because employing the aggregation principle in the manner the prosecution sought would have "obliterat[ed] the intrastate/interstate distinction that was reinforced under *Lopez*." *Id.*

"We do not believe," the court said, "that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it." *Id.* at 212. *See also United States v. Rodia,*194 F.3d 465, 477 (3d Cir. 1999) ("a number of courts have applied *Wickard*'s aggregation concept to all activities, economic and non-economic, without acknowledging 'that *Lopez* approvingly discussed the aggregation principle only in conjunction with economic activity' " (*quoting United States v. Hickman,* 179 F.3d 230, 238 (5th Cir. 1999) (Higginbotham, J., dissenting))).

The Fifth Circuit has been one of those courts that has read the jurisdictional element out of federal statutes and applied *Wickard*'s aggregation concept to all activities,

economic and noneconomic alike. After *Lopez,* the Fifth Circuit held that prosecutions under the Hobbs Act did not require the government to prove in each case a substantial effect on interstate commerce as an element of the crime. *United States v. Robinson,* 119 F.3d 1205, 1215 (5th Cir. 1997). Instead, the court held that such prosecutions were within Congress' power whenever that type of criminal activity, *if repeated elsewhere in greater numbers*, would affect interstate commerce. The *Robinson* rule was subsequently upheld by an evenly divided *en banc* court in *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002), but the dissenters pointed out that *Lopez* and *Morrison* explicitly precluded the use of the aggregation principle in cases involving intrastate noncommercial conduct. *See id.* at 402. *See also United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

This same conflict of opinion has emerged again in this case. The Fifth Circuit has upheld the ESA against a constitutional challenge by aggregating intrastate, noncommercial "takes" of cave-dwelling insects with the "takes" of all other protected species. This decision not only conflicts with the "substantial effects" standard this Court set forth in *Lopez* and *Morrison,* it also conflicts with the Commerce Clause analysis adopted by other circuits.

This case is emblematic of the confusion in and among the circuit courts about the scope of the Commerce Clause and the application of *Lopez* and *Morrison* to intrastate, noncommercial activity. A resolution of the questions presented by this case would assist the lower courts in adopting a more uniform approach to Commerce Clause analysis. Therefore, the petition should be granted.

2. The Petition Should Be Granted Because This Case Raises a Fundamental Federal Question of Great Importance That Affects Every Citizen

This is not the first time this Court has been petitioned to decide if the Endangered Species Act goes too far in prohibiting the "taking" of certain isolated species. However, this Court has not yet addressed this question. This Court has denied certiorari in three other cases raising the same important issue presented here. *See National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied* (whether regulation of local fly under the ESA exceeds the commerce power); *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert. denied* (whether regulation of local fairy shrimp under the ESA exceeds the commerce power); and, *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied* (whether regulation of local toad under the ESA exceeds the commerce power).

As this Court has observed, the environment is "a matter in which it is common to think all persons have an interest." *Bennett v. Spear*, 520 U.S. at 165. Likewise, everyone has an interest in the "rule of law." But as this case demonstrates, the lower federal courts have traded our most fundamental constitutional safeguards for speculative environmental protections.

Those safeguards require a federal government of limited powers. *See* U.S. Const. Art. I, § 8. The Framers understood this:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

The Federalist No. 45, at 292-293 (James Madison) (C. Rossitor ed. 1961).

This Court has expressly acknowledged that this division is necessary to protect our fundamental liberties:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

But if Congress can pass laws under the commerce power regulating any individual activity that in the aggregate threatens protected species, as the court held it could in this case, there is no human endeavor beyond federal control: "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565.

Even the Fifth Circuit recognized this problem:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic activity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

United States v. Ho, 311 F.3d 589, 599 (5th Cir. 2002).

The Fifth Circuit failed to heed its own warning, however. While the circuit panel asserted its decision in this case would not impinge on areas of traditional state concern, such as "land use or wildlife preservation," *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003), six judges on the circuit disagreed, pointing out that when the Fish and Wildlife Service lists a species, the federal government has "functional control over the land designated as its habitat." *GDF Realty Investments v. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (dissenting from the denial of rehearing *en banc*).

If that authority is not directed at regulating interstate commerce, these judges observed, it "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* (citing this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001). And, in fact, it has.

Shortly after Congress passed the ESA in 1973, this Court declared the Act the most comprehensive legislation ever passed by any nation for the protection of species and that enforcement of the Act must occur "whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179, 184 (1978). This "species first, people last" reading of the ESA gave more power to the federal government than any other environmental law and set up an inevitable constitutional conflict. According to the Fish and Wildlife Service, as reported on its website, over 1,250 species of plants and animals have been listed across the nation. As evidenced by this case, and others like it, federal officials assert plenary authority over land and water resources all across the country where listed species exist.

In his article, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to*

Intrastate Species, 25 T. Jefferson L. Rev. 649 (2003), Justin G. Reden considers whether application of the ESA to intrastate, noncommercial species satisfies this Court's Commerce Clause test as set forth in *Lopez* and *Morrison*. He concludes it does not:

> There is no rational basis upon which Congress could conclude that such intrastate species have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by modern Supreme Court jurisprudence.

Id. at 650.

As expressed by Reden,

> Congress has unconstitutionally transformed the Commerce Clause into a tool used to slowly and impermissibly unsettle the balance of power between the States and the federal government, placing almost unfettered jurisdictional power in the hands of the federal government.

Id.

As a result, Reden calls for judicial review:

> Where federal legislation, such as the ESA, unconstitutionally arrogates to the federal government powers properly belonging to the individual States, the judicial branch must intervene and enforce the notions of federalism the founding fathers envisioned.

Id.

Reden is not alone. The dissent to the denial of rehearing *en banc* in this case veritably screams for Supreme Court review. In a five page opinion authored by Judge Edith Jones

and joined by Judges Jolly, Smith, DeMoss, Clement, and Pickering, the panel's errors are laid bare. First, the dissent points out the inconsistency of the panel's decision that concedes, on the one hand, there is no link between the cave species and any sort of commerce and, on the other hand, applies the ESA to the "taking" of these species because "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." *GDF*, 362 F.3d at 291. This is ironic because the panel had previously rejected this argument when it explained that focusing on the underlying activity would allow application of unconstitutional statutes to commercial actors but not noncommercial actors and would result in unlimited congressional authority to regulate intrastate activities. *Id.*

Second, the panel stated the "taking" of the cave species could be regulated because the "take" of any species would undermine the purpose of the ESA to protect ecosystems and threaten the interdependent web of all species. *Id.* However, the dissent saw this as a thinly disguised attempt to justify the aggregation of noncommercial activity twice rejected by this Court in *Lopez* and *Morrison*. "An even more obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution," the dissent added, "is that the Commerce Clause regulates commerce, not ecosystems." *Id.* at 292.

Third, while the panel acknowledged this Court's concern that federal legislation recognize a limiting principle in the exercise of the commerce power so as not to obliterate the distinction between what is local and what is national, the dissent found the panel opinion plainly "tramples that precept." *Id.*

Finally, the panel concluded that the connection between cave species "takes" and a substantial effect on interstate commerce is not attenuated. *Id.* at 292-293. But the dissent found that conclusion illogical and remarked that aside from

that problem, the federal circuits, including the Fifth Circuit, have recognized that otherwise constitutional enactments may be invalid in some applications, as the ESA was in this case: "[M]any applications of the ESA may be constitutional, but this one simply goes too far." *Id.* at 293. To be true to this Court's Commerce Clause decisions, therefore, the dissent calls for further appellate review. *Id.*

The question before this Court is narrow and specific. This Court is called on to determine if the "take" provision of the ESA goes too far as applied to six noncommercial cave-dwelling insects in a small part of a large state. Addressing that question will assist the lower courts in applying the "substantial effects" test under *Lopez* and *Morrison*. This Court need not address the validity of the ESA generally. Nor would invalidation of the Act, as applied in this case, put all intrastate species at risk of extinction. Other federal and state laws are available to protect such species and their habitats. For example, the State of California, which is home to the largest number of listed species, has it's own Endangered Species Act, and federal laws like the Clean Water Act are enforced to protect wetlands and other waters which provide habitat to threatened and endangered species. For these reasons, this Court should grant the petition.

CONCLUSION

This Court has never upheld federal regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity has been economic in nature. To do so would allow Congress unlimited regulatory authority under the Commerce Clause to rival the police powers of the states. But, the Fifth Circuit has given Congress such authority in this case through the ESA. Therefore, to bring that circuit and other federal courts in line with this Court's

Commerce Clause jurisprudence and constitutional principles of federalism, this Court should grant the petition for writ of certiorari and overturn the decision below.

DATED: September, 2004.

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